CHARLES A. MITCHELL, JR.

IBLA 76-648 Decided April 1, 1977

Appeal from decision by the High Desert, California, Area Manager, Bureau of Land Management (BLM), canceling appellant's Newberry Allotment Grazing Lease 04067516.

Affirmed.

1. Grazing Leases: Generally ! ! Grazing Leases: Preference Right Applicants

   A preference right applicant is properly determined to have lost control of non ! federal leased lands which constitute the basis for the preference and thereafter his section 15 grazing lease is subject to cancellation where (1) the lessor of the preference land notifies the BLM that the applicant's private lease has been terminated for delinquent rental; (2) the provisions of the private lease on record with the BLM clearly indicate the lessor has ample authority to cancel that lease at his discretion; and (3) after confrontation with these circumstances by a BLM show cause notice, the applicant does not deny he has lost control of his base lands, nor does he provide positive or substantive evidence that he still controls the private leased base lands.

2. Grazing Leases: Cancellation

   In accordance with 43 CFR 4125.1-1(i)4, and with the terms of a section 15 grazing lease, Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970), a preference

right lease will be terminated upon loss of control by the lessee of non!federal lands which have been recognized as the basis for the issuance of that lease.

APPEARANCES: Sanford C. Shaw, Esq., of Newberry Springs, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Charles A. Mitchell, Jr., has appealed from a decision of the High Desert, California, Area Manager, BLM, which canceled his grazing lease 04067516 for the reason that he had lost control of non!federal lands that were recognized as the basis for issuance of that lease.

The record shows that Mr. Charles A. Mitchell, Jr., 1/ acquired this grazing lease in question from the BLM for a period of 3 years, effective February 1, 1975, to January 31, 1978. The lease was issued under section 5 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970), for the use of 24,138.82 acres of National Resource Land (NRL), in the Newberry Mts. Allotment.

The granting of this lease was based on appellant's statement in his lease application in Item 5a that he claimed a preference right to a federal lease based upon his control of 10,346.59 acres of private land which he leased from the Southern Pacific Land Company, S.P. Lease No. 1559!A (S.P. lease). Appellant had acquired his right to this tract of Southern Pacific land August 21, 1972, in an assignment from the former lessee, Robert W. Haddan. A copy of the original Haddan!S.P. lease on record with the BLM, executed April 1, 1964, for a 1!year period, at a rental of $ 310.40 per year, indicates the lease was to be continued from year to year with the consent of both parties. 2/

On February 2, 1976, the High Desert Area Office received formal notification by letter of January 30, 1976, from Robert J. Morris, Contract Agent of Southern Pacific Land Company, that

1/ Mr. Mitchell is also referred to as "Pat" Mitchell at several places in the case record. He is also joined on some of the lease documents by his wife, Elsie M. Mitchell.

2/ Lease clause No. 17 of the assigned Southern Pacific lease 1559!A provides:

"This lease may be continued in effect from year to year with the consent of both parties, upon the same terms and conditions, subject always to termination on fifteen (15) days notice as herein provided, by payment in advance of the yearly rental."

appellant had lost control of the Southern Pacific leased land within S.P. lease 1559!A. The letter stated:

> * * * The above lease was recently terminated effective March 31, 1974. Rental was delinquent from April 1, 1974, and lessee failed to respond to our correspondence * * *.

On February 17, 1976, the Area office acting pursuant to 43 CFR 4125.1-1(h), 3/ sent appellant a show cause notice stating that they had received notice of termination of S.P. Lease No. 1559!A, that this lease was recognized as the basis for his TGA Lease No. 04067516, and that he was to show cause why this grazing lease should not be terminated pursuant to the regulations.

Appellant's response to the BLM notice did not deny he had lost control of the Southern Pacific land, nor did he claim at that time that he still retained control of the base land. Instead, he responded that he now had a substitute lease for other lands (44.30 acres) in Lot 1, Sec. 10, T. 7 N., R. 2 E., SBBM, for 6 months from March 4, 1976, to September 3, 1976. The BLM office noted in its decision, that this land was not originally claimed as preference land by the appellant. The area manager found that this substitute lease was not recognized as preference land nor was it enough private land to provide an adequate basis for TGA lease No. 04067516. The decision canceling the lease followed on March 31, 1976.

In his statement of reasons, appellant requests a hearing to present evidence on issues of fact, i.e., whether S.P. Lease No.

3/ 43 CFR 4125.1-1(h) provides:

"(h) Cancellation or reduction of leases; show cause. Leases are subject to cancellation or reduction for the lessee's failure to comply with the terms of the lease or the provision of this part of the regulations, or in any case that a lease confers use in excess of that properly allowable. In any such case the Authorized Officer will notify the lessee that the lease is being held for cancellation or reduction in whole or in part, and will allow the lessee fifteen (15) days from receipt of the notice within which to show cause why such action should not be taken. The notice will fully set forth the reasons for the proposed action, specifically referring to the pertinent provisions of the regulations, and will be served on the lessee personally or by certified mail. The Authorized Officer will consider any cause shown and, if not satisfied as to its sufficiency, or if no cause is shown, he will notify the lessee personally or by certified mail that the lease has been cancelled or reduced as the case may be. Such decision is subject to appeal."

1559!A was terminated March 31, 1974. Appellant contends that the lease is still in effect with Southern Pacific. He asserts the Southern Pacific is claiming rental to March 31, 1976, and, therefore, he has had control of the land and will continue in that control until such time as his control may be divested by a judicial decision of a court of competent jurisdiction. Appellant also contends the Bureau should not have inquired into the status of the lease of base lands because, in effect, this gives the private lessor leverage to obtain a higher rental.

[1] After reviewing the record in the matter, we agree with the BLM area manager's conclusion that appellant has presented no positive or substantial evidence that he presently controls the 10,346.59 acres of the preference right lands leased from Southern Pacific Land Company. Although appellant still claims to have retained control of this acreage, his bare assertion is not supported by the facts, the admissions of record, and the controlling provisions of that lease itself.

First, as indicated in the decision below, the Bureau was notified by an authorized representative of the Southern Pacific Land Company that the company considered lease 1559!A terminated effective March 31, 1974, and further was preparing to lease that land to another party (Mr. David Fisher). The company cited delinquent rental as the reason for termination. When confronted with these circumstances by the Bureau's show cause notice of February 17, 1976, appellant did not deny delinquency in rental. Although given adequate time he did not provide any positive proof of his continued control of the S.P. land. Moreover, he admitted he could no longer afford the S.P. Lease. 4/

Next, as we have already noted, the S.P. Lease was a yearly lease extended only with the consent of both parties and subject to termination upon 15 days notice. Yearly rent was due in advance to extend the lease. A closer examination of that lease reveals that the lessor has the right to terminate for any default in the agreement in lease clause No. 14. 5/ Yet, even more damaging

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4/ A confirmation memo in the case record of a telephone conversation of February 19, 1976, from Pat Mitchell to BLM employee, Gail Givens, shows that Mitchell stated he could no longer afford the S.P. Lease because forage would not support livestock.

5/ S.P. Lease clause No. 14 provides:

"If Lessee shall fail to keep and perform any agreement or condition of this lease and shall fail to cure such default after written demand by lessor so to do, such default shall, at the opinion of lessor, operate as a forfeiture of all rights of lessee hereunder, and lessor may thereupon declare this lease terminated and re!enter and take possession of said lease premises, together

to appellant's claim that he still controls the leased land is the right of unilateral termination reserved to the lessor at his discretion in clause No. 16 as follows:

> Notwithstanding anything hereinbefore contained, lessor may terminate this lease at any time during the term aforesaid, or any extension thereof or holding over hereunder, by fifteen (15) days' notice in writing; and upon such termination of the lease, lessor will accept the pro rata amount of the rental theretofore paid in advance covering the period from and after the date of such notice, provided that if the amount of such refund shall be less than one dollar ($ 1.00) no refund shall be claimed or made.

These lease provisions taken with the written confirmation of Southern Pacific's affirmative actions to terminate the lease, would clearly indicate to the BLM that appellant had lost control of his base lands. Appellant's assertion that he remains on the land irrespective of the Southern Pacific's termination only indicates that he may be in trespass or a tenant at sufferance. The fact that S.P. claims back rent for the continued occupancy in no way proves that he holds a valid lease and controls the lands in question. Without substantial proof otherwise, the appeal record confirms the BLM's

Appellant alleges that the Bureau's inquiry as to the status of the S.P. Lease gives the lessor an unfair advantage in negotiating the rental. The amount of that rental fee is of no significance to the BLM, but rather is a private matter to be settled by the parties. However, the good standing of appellant's preference right leased lands are a proper concern of the Bureau. The Bureau must decide whether or not the appellant is entitled to a continued lease of the NRL lands. A primary factor for consideration is positive evidence of control of the preference lands upon which the lease was first issued. Appellant provided no such evidence. The proper function of this Department is to ascertain whether or not a grazing applicant meets the applicable statutory and regulatory requirements. See Ruth E. Han, 13 IBLA 296, 80 I.D. 698 (1973).

[2] The governing regulation, 43 CFR 4125.1-1(i)4 provides:

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fn. 5 (continued)
with all improvements thereon. A waiver by lessor of any default shall not be deemed to be a waiver of any other or subsequent default."

> The grazing lease will be terminated in whole or in part because of loss of control by the lessee of non!Federal lands that have been recognized as the lands for the grazing lease.

Section 3(h) of appellant's grazing lease specifically embodies this requirement providing:

> This lease may be terminated or adjusted because of loss of control by the lessee of all or part of his preference right lands, or if this lease was issued improperly through error with respect to any material fact.

The Department has terminated a lease when the lessee loses control of his base lands. Alan G. Haigh, 18 IBLA 242 (1974); Joseph Rebich, A-27491 (January 13, 1958); The Swan Co. v. Banzhaf, 59 I.D. 262 (1946); Orin Patterson, 56 I.D. 380 (1938). See also Harry Grabbert, 12 IBLA 255, 80 I.D. 531 (1973).

Appellant also asks for a reversal of the decision below because he has obtained and now holds control of other relevant private real property interests (approximately 244 acres) which he terms appropriate as basis for the TGA lease. Whether these lands constitute a proper basis for a lease for all or part of the NRL or whether the NRL should be leased, as it has been in the past, to a lessee of Southern Pacific ought to be determined in the first instance by the District Manager if conflicting applications for a lease are filed. However, the possibility that appellant may file for a new lease does not require that the decision canceling his current lease be stayed.

Appellant's request for a hearing is denied because he has been offered ample opportunity to show error in the decision below. There are now no statutory or regulatory procedures providing for a full evidentiary hearing before an administrative law judge as a matter of right for section 15 grazing lease applicants. However, under the general procedural regulations any party to an appeal may request, and the Board may, in its discretion, order a hearing to take evidence on an issue of fact. 43 CFR 4.415. Such a hearing is ordered only if there is a sufficient basis for doing so. Ruth E. Han, supra, 13 IBLA at 304, 80 I.D. at 701. As indicated herein, appellant has failed to allege facts which, if proven, would justify a different conclusion. Clark Canyon Lumber Company, 9 IBLA 347, 80 I.D. 202 (1973); Elaine S. Stickelman, 9 IBLA 327 (1973). Nor has appellant demonstrated that a hearing would serve any useful purpose.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge